

ADP HIPAA COVERED ENTITY ANALYSIS

The Health Insurance Portability and Accountability Act (1996) legislationⁱ identifies the State Medicaid programs as health plans. Thus, the California Medi-Cal program is a covered entity that must comply with the Transactions and Code Sets, Privacy, Security and other HIPAA rules.

The Department of Health Services (DHS) is the Single State Agency designated by the Federal Government to administer Medicaid in California (Medi-Cal). The Department of Alcohol and Drug Programs (ADP) administers Drug Medi-Cal substance abuse services through an Interagency Agreement with DHS¹.

Title 22 of the California Code of Regulations (CCR) states that ADP shall:

- (1) "Provide administrative and fiscal oversight, monitoring, and auditing for the provision of statewide Drug Medi-Cal substance services;
- (2) Ensure that utilization review is maintained through on-site post service post payment utilization review; and
- (3) Demand recovery of payment in accordance with the provisions of Subsection (m) of this regulation."¹
- (4) Reimburse providers for substance abuse services to Medi-Cal beneficiaries¹
- (5) Establish statewide maximum allowances for reimbursement¹
- (6) Receive and manage appeals¹

The Health and Safety Code allows the Department to enter into a Medi-Cal Drug Treatment Program contract with each county, and directs the Department to:

- Establish a narcotic replacement therapy dosing fee ¹
- Contract directly with the certified providers in any county which refuses to execute the Medi-Cal Drug Treatment Program contract¹
- Publish procedures for contracting for Drug-Medi-Cal services with certified providers and for claiming payments¹
- Provide counties and contractors with a utilization control plan for Drug Medi-Cal services¹

The Health and Safety Code¹ mandates an interagency agreement (IAA) between ADP and DHS. ADP functions and responsibilities spelled out in the current IAA include:

- Administer funding and provide reimbursement for EPSDT and Minor¹ Consent services
- Provide the nonfederal share of the cost of services and administration
- Submit invoices and maintain records reflecting actual expenditures
- Ensure the quality, appropriateness and availability of services
- Ensure that each county maintains current contracts with providers

¹Section 1171(5)(E) of the Social Security Act

- Review and certify providers to participate in the Drug Medi-Cal program

HIPAA IMPACT ON ADP PROGRAMS:

But does ADP's Drug Medi-Cal authority comprise **joint administration** of the Medi-Cal program, or does it only require ADP to act **on behalf of DHS**?

- State budget authority for Drug Medi-Cal is equally divided between DHS and ADP.
- ADP has a broad range of responsibilities for Drug Medi-Cal administration.
- The counties and providers generally regard ADP as the administrator of Drug Medi-Cal.

The final Privacy Rule excepts from the definition of "health plan" a government-funded program (other than one, such as Medicaid, named in the definition of a health plan) which does not have as its principal purpose the provision of, or payment for, the cost of health care or which has as its principal purpose the provision, either directly or by grant, of health care. For example, the family planning program authorized by Title X of the Public Health Service Act pays for care exclusively through grants, and so is not a health plan under the rule. These programs (the grantees under the Title X program) may be health care providers, and as such would be covered entities if they conduct standard transactions.

The fact that ADP administers federal Substance Abuse Prevention and Treatment (SAPT) funds by allocating them to counties on a population-driven formula, rather than by reimbursing providers on a service or capitation basis results in these funds not meeting the definition covered transactions under the HIPAA rules. The system for administering SAPT funds, Net Negotiated Amount (NNA) contracts with counties, also transfers State General Fund dollars to the counties. While the NNA contracts are not designated as grants, they behave very much like grants for the provision of health care. The counties use the SAPT funds to deliver health care in their communities – operating their local programs with considerable local control – as opposed to using the funds to provide goods or services to be used by ADP or to fulfill ADP's duties. The latter would be more consistent with a "contract" label. What actually happens is more consistent with a "grant" label, although that label is not used in the NNA process at this time.

State funds from Proposition 36, the Substance Abuse and Crime Prevention Act (SACPA) provide funding and a regulatory structure for treatment services for eligible convicted drug offenders. However, there is no *direct* relationship between ADP and the participants before, or for that matter, during or after the time that treatment services are provided. As with the SAPT funds, there is no client-specific enrollment or billing to ADP. SACPA creates a new sentencing

scheme that favors treatment over incarceration. The provision of funding to cover counties' costs in implementing this scheme does not make it a health plan under HIPAA.

For SAPT, SACPA and other funds, it is possible that ADP could organize its activities in a way that might make it a health plan or some other form of covered entity. But it has not done so.

SUMMARY

DRUG MEDI-CAL (DMC)

The HIPAA Privacy Rule preamble states:

Where a public agency is required or authorized by law to administer a health plan jointly with another entity, we consider each agency to be a covered entity with respect to the health plan functions it performs...and... joint administration does not meet the definition of a 'business associate' [vs. a covered entity].

This and other factors have lead to the conclusion that ADP is a Covered Entity under HIPAA by virtue of its legislated role in the administration of Drug Medi-Cal funds. Since it is jointly administering these funds with the Department of Health Services(DHS) it is not a Business Associate of that Department, but a separate Covered Entity working in conjunction with DHS .

SUBSTANCE ABUSE PREVENTION AND TREATMENT PERFORMANCE BLOCK GRANT (SAPT) AND SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000(SACPA)

The HIPAA law defines a health plan and names Medicaid a health plan in the law. The Privacy Rule states that a government-funded program (other than Medicaid), is not a health plan (unless it is named in the HIPAA law) when its principal purpose is the provision of health care either directly or by grant. None of the HIPAA definitions of a health plan, nor the various definitions of a Covered Entity describes ADP's administration of the federally funded SAPT programs or state funded SACPA programs. Therefore, the HIPAA law and HIPAA rules do not affect programs funded through SAPT and/or SACPA.

Disclaimer: ADP's status under HIPAA is a legal question that cannot be answered with complete certainty because there as yet no case law to support or inform our interpretation of HIPAA definitions. Any resolution of the covered entity issue should be subject to relevant case law as it develops and/or any changes to legislation or the role of ADP in administering Drug Medi-Cal, SAPT or SACPA programs.

